Supreme Court, U. S.
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No. 79-2044

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Appellants,

-against-

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Appellees,

and

JAMES BOVIS, et al.,

Intervenor-Appellees,

MR. AND MRS. PHILIP FENSTER, et. al.,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK TO AFFIRM

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Appellee Frank J. Macchiarola, Chancellor of the Board of Education of the City of New York, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to affirm the judgment of the three-

judge district court for the Southern District of New York. Appellee moves on the ground that since constitutional adjudication of the Establishment Clause question presented herein depended upon a careful evaluation of the facts of this particular case, the unanimous three-judge court's finding of constitutionality based on an extensive uncontradicted record warrants an affirmance by this Court.

QUESTION PRESENTED

Whether the use of federal funds to provide remedial educational services to economically and educationally deprived children on the premises of nonpublic schools during school hours violates the Establishment Clause of the Constitution.

STATEMENT

This is a direct appeal from the final judgment entered on April 30, 1980, by a district court of three judges convened pursuant to 28 U.S.C. §2282, dismissing appellants' complaint. Appellants seek to enjoin the allocation of funds provided to New York City under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, as amended, 20 U.S.C. §2701, et seq ("Title I"). After a trial on April 10, 1979, at which appellees presented extensive, uncontradicted documentary evidence describing New York City's Title I nonpublic school program and live testimony by program teachers and administrators, the three-judge district court unanimously held that based on the specific fact situation presented, "Title I, as interpreted and applied in New York City, does not vio-

late the First Amendment of the Constitution." J.S. App. 4a.

In its opinion, the court outlined Title I's statutory framework and its implementation. Title I was enacted in 1965 in recognition of the significant correlation between poverty and learning deficiencies. 20 U.S.C. §2701; see S. Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & Ad. News 1446, 1450; J.S. App. 8a. It is the largest single federally funded education program in the country, servicing approximately 4,800,000 children who attended public schools and 200,000 children who attended private schools during the 1979-1980 school year. Affidavit of Genevieve Dane, Program Operations Branch Chief in HEW's Division of Education for the Disadvantaged, sworn to April 20, 1979 ("Dane Aff."); J.S. App. 13a. Only 4% of the budget financed

remedial services for children attending nonpublic schools. Id.; J.S. App. 13a.

Under Title I, funds flow not to individual children or to individual schools, but to local public education agencies (LEAs) which must maintain exclusive direction and control over the provision of services. 45 C.F.R. §116.42; J.S. App. 11a. Only services which are not provided as part of a child's regular curriculum may be offered. Title I services must "supplement" rather than "supplant" the regular education program. 20 U.S.C. §§2734(f), 2736(c); J.S. App. 9a. Recipients of Title I services must meet two criteria: educational deprivation and residence in an area with a concentration of children from low income families. 20 U.S.C. §§2722, 2732-2734; J.S. App. 9a.

Title I services follow the child regardless of the school he attends. The Act specifically provides that services comparable to those offered to children attending public school be offered to children whose parents elect to send them to nonpublic schools. 45 C.F.R. §116a.23; J.S. App. 10a. Federal and local officials administering the statute have adhered to the view that services directed to nonpublic school children may be provided on the premises of the nonpublic institution. Wheeler v. Barrera, 417 U.S. 402, 421-23 (1974), judgment modified, 422 U.S. 1004 (1975); 45 C.F.R. §116a.23(f); Dane Aff. at ¶11; Affidavit of Lawrence F. Larkin, Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Edcuation, sworn to April 17, 1979 ("Larkin Aff."), ¶9; J.S. App. 9a. Services

to children who attend nonpublic schools are administered solely by public employees of the LEA. 20 U.S.C. §2734(m); 45 C.F.R. §§116.42,116a.23(f); J.S. App. 9a.

In 1976, a United States Office of Education study in Missouri concluded that services provided at times other than during the normal school day were not comparable. Affidavit of Joseph J. Vopelak, Acting Chief of the Institutional Services Section, Program Support Branch, in HEW's Division of Education for the Disadvantaged, sworn to April 20, 1979 ("Vopelak Aff."), ¶14; J.S. App. 13a. Initial determinations of noncomparability have been made for more than fifty other Missouri districts. Id. ¶16. In New York City, it was decided to provide Title I remedial services directly on the premises of the nonpublic schools during regular school hours, only after experi-

menting with alternative ways to deliver comparable services failed. Larkin Aff. ¶¶135, 136; Defendants' Exh. L. at 3 (Statement by Board on Title I Proposals, dated August 31, 1966); J.S. App. 14a.

ARGUMENT

The court below correctly concluded that in Establishment Clause adjudication there is no per se rule. Instead, a court faced with a First Amendment challenge must undertake "a careful evaluation of the facts of the particular case." Wheeler v. Barrera, supra, 417 U.S. at 426. "First Amendment implications may vary according to the precise contours of the plan that is formulated." Id. at 426. Accordingly, the court rejected as contrary to Wheeler (J.S. App. 8a), appellants' contention that "the issue in this case is not what is actually done; the issue

in this case is what is authorized by the law which we are challenging." The court held that it could not "rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program." J.S. App. 30a.

The court correctly concluded that resolution of the issue required the court to apply the three-part test established by the Supreme Court:

> First, the statute must have a secular legislative purpose. ... Second, it must have a "primary effect" that neither advances nor inhibits religion... Third, the statute and its administration must avoid excessive government entanglement with religion. (citations omitted).

Meek v. Pittenger, 421 U.S. 349, 358 (1975).

First, the legislative history of Title I clearly demonstrates that the purpose of the statute was to give aid to needy

children, regardless of where they attend school. See 20 U.S.C. §2701; S. Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & Ad. News 1446, 1450; J.S. App. 20a. Nor do plaintiffs suggest that the enactment of Title I was motivated by an impermissible congressional purpose or design. J.S. App. 20a.

Second, confining itself to the undisputed evidence presented by appellees, the court unanimously found that "neither the statute nor the programs it has engendered constitute a vehicle for advancing religious education." J.S. App. 25a. This conclusion is based upon the court's examination of a fourteen year record "that demonstrated to the court's satisfaction that the program has remained free from religious influences and has not promoted the religious mission of the nonpublic

schools." J.S. App. 29a.

To emphasize the factual nature of its holding, the court noted the extensive evidentiary record before it and termed this record a "critical feature distinguishing this case from prior decisions" of the Supreme Court (J.S. App. 36a):

> The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services.

The court concluded that the "evidence establishes that the result feared in other cases has not materialized in the City's Title I program." J.S. App. 36a.

The Court's ultimate conclusion is based upon a number of subsidiary factual findings. First the Court found "uncontroverted evidence" that the inner-city parochial schools where Title I services are provided "do not have the characteristics of the pervasively sectarian schools described by the Supreme Court." J.S. App. 31a. Title I teachers "do not perceive a 'dominant sectarian mission' and have not been subject to religious pressures or influences in the parochial schools in which they work." J.S. App. 31a. "Title I materials and equipment are not diverted from their intended use and do not promote any religious activity. In short, the publicly owned instructional materials do not support the collective educational enterprise of the parochial school." J.S. App. 33a-34a. The Court further found that "[a]lthough

physically unified, secular and sectarian instruction remain educationally distinct. Title I classrooms are free from religious symbols, contain separate materials and equipment, and are run solely by public school employees who are not subject to the supervision of private school administrators." J.S. App. 34a.

In sum, the court found extensive evidence to support its conclusion that Title I as implemented in New York City did not have the primary effect of advancing or inhibiting religion. J.S. App. 37a. The court's finding of no violation, conceded by appellants' counsel prior to and during trial (Trial Transcript, May 10, 1979, 8, 68, 105, 112; J.S. App. 7a), warrants an affirmance by this Court.

Finally, the three-judge district court unanimously concluded, as a factual matter, that New York City's Title I nonpublic school program does not involve an "excessive entanglement" between the government and religious institutions. J.S. App. 47a.

To satisfy the third element of the tripartite Establishment Clause test "Title I must avoid 'excessive entanglement' between the government and institutions." J.S. App. 37a. "While recognizing that some interaction is inevitable, the Supreme Court has sought to prevent the intrusion of either into the realm of the other." Id. "The test is inescapably one of degree." Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

Although the court was fully cognizant that the Supreme Court has previously held that "[t]he prophylactic contacts required

to ensure that teachers play a strictly nonideological role ... necessarily give rise to a constitutionally intolerable degree of entanglement between church and state" (Meek, supra, 421 U.S. at 370, citing Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)), the district court nevertheless unanimously concluded that "the evidence in this case establishes that New York City's Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation" thereby distinguishing Meek from the case at bar. J.S. App. 47a. That determination, unless found to be clearly erroneous, must be affirmed by this Court.

The district court premised its conclusion on major distinctions in the program as operated in New York City for a period of over fourteen years and other programs which

the Court has held unconstitutional. See Opinion below, J.S. App. 37a-47a. First, the Court in Meek and Lemon had found that schools which are pervasively sectarian create a danger that religious doctrine will permeate secular instruction and constant surveillance would therefore be necessary to insure that teachers do not engage in the impermissible fostering of religion. Meek, supra, 421 U.S. at 370, 372; Lemon, supra, 403 U.S. at 619. But since the typical nonpublic school where services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution (J.S. App. 31a, 40a), and the Title I personnel assigned to the nonpublic schools do not perceive a dominant sectarian mission or atmosphere in the schools in which they teach (id.), "the need for continuous surveillance to guard against the danger is

correspondingly reduced." J.S. App. 41a.

Second, whereas the Supreme Court had held in Meek that the district court had "erred in relying entirely on the good faith and professionalism of the secular teachers... to insure that a strictly non-ideological posture is maintained" (Meek, supra, 421 U.S. at 349), the district court did not have to rely on the good faith of Title I teachers and supervisors" (J.S. App. 41a), since "the affirmative evidence before this Court establishes that Title I personnel have not fostered religious views or advanced religious activities." J.S. App. 41a (emphasis in original). The court states at J.S. App. 42a:

> Furthermore, the undisputed testimony of numerous Title I personnel demonstrates that they strictly adhere to the regulations restricting their own activities and the use of materials, and that they view

> their role as independent of the nonpublic schools' instructional program. [Citations to affidavits omitted].

The district court therefore unanimously concluded that "because the aid provided under Title I does not result in an 'impermissible fostering of religion,' the 'continuing surveillance' deemed necessary in Meek is not required to guard against the advancement of religious views or pursuits." J.S. App. 42a.

To the extent that "this case involves public supervision on the premises of the parochial schools, an arrangement that the Meek Court considered excessively entangled" (J.S. App. 42a), the district court found ample evidence to distinguish Meek. The Title I classrooms are free from religious influences and are distinct from the facilities used by the nonpublic school for regu-

lar instructional activities (J.S. App. 43a; Larkin Aff. ¶107); Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools (J.S. App. 44a; Larkin Aff. ¶78); the supervisor reviews and evaluates only the performance of the Title I teacher in the Title I classroom (J.S. App. 44a); routine administrative contacts that occur between Title I personnel and nonpublic school administrators fall within the realm of permissible government-church contacts (J.S. App. 44a-45a) since "[m]inor administrative contacts between public employees or officials and religious authorities do not violate the Establishment Clause (J.S. App. 44(a), citing, Wolman v. Walter, 433 U.S. 229, 246 n.13 (1977) and Walz v. Tax Comm'n, supra, 397 U.S. at 674-76.).

Finally, the district court found that Title I is fundamentally different from those educational programs which have been found to create "the potential for divisive religious fragmentation in the political arena." J.S. App. 46(a), citing, Tilton v. Richardson, 403 U.S. 672, 688 (1971). Since only four percent of the national Title I budget is allocated to nonpublic school students, and fewer than one-fourth of the parochial schools in New York City have Title I services on their premises, the court reasoned that legislative considerations of the statute and annual appropriations are far less likely to give rise to the political divisiveness along religious lines feared by the Court in Meek. J.S. App. 46a. "Indeed, although Congress has appropriated funds for Title I since 1965... no evidence of any 'divisive

religious fragmentation' has been presented." Id. (emphasis supplied).

In sum, the district court unanimously concluded that Meek is clearly distinguished from the case at bar in that "the evidence in this case establishes that New York City's Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation." J.S. App. 47a.

CONCLUSION

"Having considered all the evidence in this action" (J.S. App. 47a), the three-judge court unanimously concluded that "New York City's Title I program does not violate the First Amendment's prohibition against the establishment of religion." Id. That decision based on controlling law, unless clearly erroneous, requires affirmance by this Court.

July 24, 1980.

Respectfully submitted,

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